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6 UNITED STATES DISTRICT COURT
7 CENTRAL DISTRICT OF CALIFORNIA
8 WESTERN DIVISION
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10 ROOSEVELT BRIAN MOORE,

11 Petitioner,

12 vs.

13 M. BITER, WARDEN,

14 Respondent.
15

No. CV 11-4256 JAK (FFM)

ORDER RE SUMMARY
DISMISSAL OF ACTION WITHOUT
PREJUDICE

16 On or about May 9, 2011, petitioner constructively filed a Petition for Writ
17 of Habeas Corpus by a Person in State Custody (“Petition”) herein. The Petition
18 challenges a 1992 sentence.

19 Petitioner alleges that he has a petition for writ of habeas corpus currently
20 pending before the California Supreme Court. (Petition at 8 of 10.)

21 As a matter of comity, a federal court will not entertain a habeas corpus
22 petition unless the petitioner has exhausted the available state judicial remedies on
23 every ground presented in the petition. *Rose v. Lundy*, 455 U.S. 509, 518-22, 102
24 S. Ct. 1198, 71 L. Ed. 2d 379 (1982). The habeas statute now explicitly provides
25 that a habeas petition brought by a person in state custody “shall not be
26 granted unless it appears that -- (A) the applicant has exhausted the remedies
27 available in the courts of the State; or (B)(I) there is an absence of available State
28 corrective process; or (ii) circumstances exist that render such process ineffective

1 to protect the rights of the applicant.” 28 U.S.C. § 2254(b)(1). Moreover, if the
2 exhaustion requirement is to be waived, it must be waived expressly by the State,
3 through counsel. *See* 28 U.S.C. § 2254(b)(3).

4 Exhaustion requires that the prisoner’s contentions be fairly presented to the
5 state courts, and be disposed of on the merits by the highest court of the state.
6 *Carothers v. Rhay*, 594 F.2d 225, 228 (9th Cir. 1979). A claim has not been fairly
7 presented unless the prisoner has described in the state court proceedings both the
8 operative facts and the federal legal theory on which his claim is based. *See*
9 *Duncan v. Henry*, 513 U.S. 364, 365-66, 115 S. Ct. 887, 130 L. Ed. 2d 865
10 (1995); *Picard v. Connor*, 404 U.S. 270, 275-78, 92 S. Ct. 509, 30 L. Ed. 2d 438
11 (1971); *Johnson v. Zenon*, 88 F.3d 828, 830 (9th Cir. 1996). A federal court may
12 raise the failure to exhaust issues *sua sponte* and may summarily dismiss on that
13 ground. *See Stone v. San Francisco*, 968 F.2d 850, 856 (9th Cir. 1992);
14 *Cartwright v. Cupp*, 650 F.2d 1103, 1104 (9th Cir. 1981) (per curiam); *see also*
15 *Granberry v. Greer*, 481 U.S. 129, 134-35, 107 S. Ct. 1671, 95 L. Ed. 2d 119
16 (1987).

17 Because petitioner alleges that he currently has a petition pending in the
18 California Supreme Court, the exhaustion issue here is governed by the Ninth
19 Circuit’s holding and reasoning in *Sherwood v. Tompkins*, 716 F.2d 632 (9th Cir.
20 1983). There, the petitioner was seeking habeas relief on the ground that he had
21 been denied his right to appointed counsel and free transcripts. Although the
22 petitioner’s state appeal from his conviction still was pending, the petitioner
23 arguably had exhausted his state remedies with respect to the particular
24 claim being raised in his federal habeas petition. The Ninth Circuit held that the
25 federal habeas petition nevertheless had to be dismissed for failure to exhaust state
26 remedies:

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1 [E]ven were Sherwood to have exhausted all his state remedies with
2 respect to the denial of his appointed counsel and free transcript
3 request, that would not be enough to satisfy the requirements of 28
4 U.S.C. §§ 2254(b) and (c). When, as in the present case, an appeal of a
5 state criminal conviction is pending, a would-be habeas corpus
6 petitioner must await the outcome of his appeal before his state
7 remedies are exhausted, even where the issue to be challenged in the
8 writ of habeas corpus has been finally settled in the state courts.

9 As we explained in *Davidson v. Klinger*, 411 F.2d 746, 747 (9th
10 Cir. 1969), even if the federal constitutional question raised by the
11 habeas corpus petitioner cannot be resolved in a pending state appeal,
12 that appeal may result in the reversal of the petitioner's conviction on
13 some other ground, thereby mooting the federal question.

14 *Sherwood*, 716 F.2d at 634 (footnote and remaining citations omitted).

15 Other courts in this Circuit also have applied the *Sherwood* dismissal rule
16 where the petitioner had a state habeas petition pending. *See, e.g., Lockhart v.*
17 *Hedgpeth*, 2008 WL 2260674, **1 (N.D. Cal. 2008); *Craft v. Sisko*, 2008 WL
18 906438, *1-*2 (C.D. Cal. 2008); *McDade v. Board of Corrections*, 2007 WL
19 3146736, *1 (N.D. Cal. 2007); *Hancock v. Marshall*, 2007 WL 1521002, *1 (N.D.
20 Cal. 2007); *Kilgore v. Malfi*, 2007 WL 1471293, *2-*3 (N.D. Cal. 2007).

21 Therefore, the Petition is subject to dismissal.

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1 IT IS THEREFORE ORDERED that this action be summarily dismissed
2 without prejudice, pursuant to Rule 4 of the Rules Governing Section 2254 Cases
3 in the United States District Courts.

4 LET JUDGEMENT BE ENTERED ACCORDINGLY.

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6 Dated: July 1, 2011

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9 JOHN A. KRONSTADT
10 United States District Judge

11 Presented by:

12
13 /S/ FREDERICK F. MUMM
14 FREDERICK F. MUMM
United States Magistrate Judge